1982

Confidential Employees: A Recommendation for Uniformity

Thomas L. McGinnis

NOTE

CONFIDENTIAL EMPLOYEES: A RECOMMENDATION FOR UNIFORMITY

I. INTRODUCTION

THE TERM "CONFIDENTIAL EMPLOYEE" APPEARS NOWHERE IN THE federal government's legislation pertaining to labor relations—the National Labor Relations Act (NLRA or the Act) and its amendments.[1] In spite of this, or because of it, the narrow area of labor law relating to confidential employees has been the focal point for a substantial volume of litigation which has produced conflicting results.

The National Labor Relations Board (NLRB or the Board)[2] has defined confidential employee as "any individual who assists and acts in a con-

[1] 29 U.S.C. §§ 141-44, 151-69, 171-83, 185-87 (1975).

[2] Congress created the NLRB to administer and enforce the NLRA. The NLRB is comprised of five Board Members, a General Counsel and Regional, Subregional and Resident Offices. The Members are appointed by the President for five year terms; the General Counsel is also appointed by the President but for a four year term. The Regional Offices, thirty-three in all, and the Subregional and Resident Offices are under the supervision of the General Counsel. The NLRB has two main functions. First, it is the Board's function to certify bargaining units made up of employees for the purpose of collective bargaining. Second, the Board prevents employers and unions from engaging in unfair labor practices as defined in the Act. These two functions provide the

fidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations."[3] This is commonly referred to as the "labor nexus" test. The labor nexus test, as applied by the NLRB, is a two-pronged test which, if met, works to foreclose the right of that employee to join and participate in bargaining units, the structural cornerstone of the collective bargaining system. The first prong of the test examines the confidentiality of the relationship between the employee and her superior, the second prong examines the duties of the superior.

If the relationship between employee and superior is confidential, and if the superior is setting labor policy for management, the employee meets the labor nexus standard and is precluded from joining and participating in bargaining units. Although excluded from bargaining units, the confidential employee is otherwise fully protected under the NLRA. For example, the confidential employee is protected, while engaging in concerted activity, from unfair labor practices on the part of the employer.[4] This treatment of confidential employees is commonly known as the "limited implied exclusion." The confidential employee is impliedly excluded—there is no express mention of her in the Act—not from the total protection of the Act but from bargaining

---

basis for the overwhelming majority of Board cases. For the purposes of this Note, the first type of case will be labelled a certification case, the second will be referred to as an unfair labor practice case.

A certification case is brought before the Board by means of a petition. A petition, filed by employees seeking a bargaining unit, initiates an election process. If a majority of employees elect to be represented by a particular bargaining unit, the Board certifies that bargaining unit as the employees' exclusive representative in collective bargaining with the employer. The bargaining unit invariably is some type of union.

An unfair labor practice case, on the other hand, is initiated by means of a charge. Unions may be guilty of unfair labor practices but the majority of these charges, and the ones relevant to this discussion, are filed against employers. The charge initiates an unfair labor practice hearing before a Board administrative law judge. The administrative law judge makes findings and recommendations to the Board. The Board reviews the administrative decision and, if it finds that the charged party has engaged in unfair labor practices, the Board issues a cease and desist order and instructs the charged party as to the proper remedial action to be undertaken.

Certification cases and unfair labor practice cases overlap somewhat in that if an employer refuses to bargain with a *certified* bargaining unit, the employer is engaging in an unfair labor practice. For this discussion, however, the distinction between the two types of cases is most important. While it is the Board's practice to allow confidential employees to file unfair labor practice charges, the Board will not certify a bargaining unit made up, in any part, of confidential employees. *See* NATIONAL LABOR RELATIONS BOARD, A GUIDE TO BASIC LAW AND PROCEDURES UNDER THE NATIONAL LABOR RELATIONS ACT 44-55 (1978) [hereinafter cited as BASIC GUIDE].

[3] B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956).

[4] An example of concerted activity on the part of an employee is the signing of a petition calling for the reinstatement of a discharged fellow employee. An ex-

units.[5] When faced with a possible confidential employee situation, then, the Board employs the two-pronged labor nexus standard and, if that standard is met, the limited exclusion is triggered. The Supreme Court recently addressed the propriety of this practice.

In *NLRB v. Hendricks County Rural Electric Membership Corp.*,[6] the Court held that there is a "reasonable basis in law for the Board's use of the 'labor nexus' test."[7] At the same time, the Court declined to address the issue of whether the limited implied exclusion is also proper.[8] This Note will address that open question by tracing the legislative, administrative and judicial treatment of confidential employees. The mode of analysis will be chronological, commencing with the passage of the Act. The analysis will detail the development of the labor nexus standard and the limited implied exclusion and will examine the different treatment afforded confidential employees by the Board and the courts in light of *Hendricks*. Finally, this Note will recommend that all confidential employees, determined to be so by a uniform standard, be treated uniformly.

II. LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL TREATMENT OF CONFIDENTIAL EMPLOYEES: 1935-1946

A. *Legislative Treatment*

In 1935, Congress invoked its broad powers under the national commerce clause[9] and enacted the NLRA[10] in order to

---

ample of an employer's unfair labor practice would be the discharge of that employee for signing the reinstatement petition. *See, e.g.*, Hendricks County Rural Elec. Membership Corp., 236 N.L.R.B. 1616 (1978).

[5] *See, e.g.*, Service Technology Corp., 196 N.L.R.B. 1036, 1043 (1972); Southern Greyhound Lines, Div. of Greyhound Lines, 169 N.L.R.B. 627 (1968); Coopersville Coop. Elevator Co., 77 N.L.R.B. 1083, 1084-85 (1948); Southern Colo. Power Co., 13 N.L.R.B. 699, 710 (1939).

[6] 454 U.S. 170 (1981).

[7] *Id.* at 176.

[8] *Id.* at 185-86 n.19.

[9] U.S. CONST. art. I, § 8, cl. 3. Because the Act was passed under the commerce clause, the only employers that the Act will affect are those who have an effect on interstate commerce. The Supreme Court has held that virtually every business affects interstate commerce in one way or another. *See, e.g.*, Wickard v. Filburn, 317 U.S. 111 (1942). This being so, the NLRB could exercise jurisdiction, if called upon, over a seemingly endless amount of employers. The Board, however, limits itself to cases involving businesses whose effect on interstate commerce is substantial. For example, the principal case upon which this discussion is based concerns a rural electric power company. NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981). This utility would have to have a $250,000 total annual volume of business to be considered, for Board jurisdiction standards, as having a substantial effect on interstate commerce. *See* BASIC GUIDE, *supra* note 2, at 46.

[10] Ch. 372, §§ 1-16, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151-66 (1975)).

> eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.[11]

This was the policy behind the Act as outlined in its first section. The policy was twofold: to eliminate obstructions, *i.e.* strikes, by encouraging collective bargaining. This twofold policy leaned heavily in favor of labor. Although strikes arguably damage both management and labor, the remedy for strikes, collective bargaining, plainly is most advantageous to labor. The wording of the policy best illustrates this point: The Act would protect "the exercise by *workers* of full freedom of association self-organization, and designation of representatives of their own choosing"[12] to carry out the policy of collective bargaining.

The Act created other rights for employees as well. Employees, for the first time, had the statutorily protected "right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purposes of collective bargaining or other mutual aid or protection."[13] These are the so-called "section 7 rights" of employees and are reasonably clear. That these rights could not be abridged by employers was also explicit in the Act. It was an actionable unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."[14] What remained unclear, however, was the scope of the term employee—just whom did the Act protect?

Congress opted for a broad, rather vague definition of employee for purposes of the Act.

> The term "employee" shall include *any employee*, . . . and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home or any individual employed by his parent or spouse.[15]

---

[11] 29 U.S.C. § 151 (1975).

[12] *Id.* (emphasis added).

[13] *Id.* at § 157.

[14] *Id.* at § 158(1).

[15] *Id.* at § 152(3) (emphasis added). The definition of employee in the Act should be read in conjunction with that of employer which states in pertinent

While the meaning of "any employee" may be broad and vague, the three expressed exclusions from the definition are clear indeed: farm workers, domestic servants and persons employed by parents or spouses. In excluding farm workers from the protection of the Act, Congress was probably making a policy decision in favor of farmers. As for domestic servants and persons employed by parents and spouses, Congress seemingly believed that these employees did not need the protection of the Act because of the close relationship between employer and employee. A bargaining unit, or for that matter concerted activity, was apparently thought unnecessary and also unwanted in such homes.

Apart from the expressed exclusions then, a worker was considered, under the broad definition of the Act, an employee for purposes of the Act. Soon after the passage of the Act, however, the Board faced a problem with the Act's application. The problem was what to do with workers who otherwise meet the "employee" definition but who work in a relationship with management such that affording them the rights of employees under the Act would compromise the position of management.

B. *Administrative Treatment*

In *Willy's Overland Motors, Inc.*,[16] a 1938 case, the NLRB, in rather summary fashion, chose to exclude from a Board-certified bargaining unit the personnel manager's private secretary.[17] Due to the summary nature of this decision, open questions abounded after *Willy's*, such as whether the exclusion of the secretary was an implied exclusion from protection under the Act or merely an exclusion from bargaining units. Also, if the exclusion was one merely from bargaining units of other employees, could the excluded workers organize and form a bargaining unit of their own. The NLRB attempted to resolve these and other questions on an *ad hoc* basis to fine tune the definition of this unusual category of employee—the confidential employee. Before examining Board resolutions to these questions, it is helpful to highlight a case which, although decided a year after *Willy's*, did much more to clarify the Board's rationale underlying its treatment of confidential employees.

In *Brooklyn Daily Eagle*,[18] the Board excluded from a bargaining unit

---

part: " 'employer' includes any person acting in the interest of an employer, directly or indirectly." *Id.* at § 152(2). Apart from the fact that both definitions employ the word to be defined when defining that word, the definitions do not draw a clear line between employer and employee. A vice president of a company could be considered "any employee" while a worker on a production line should arguably be "acting in the interest of his employer." The lack of a clear definitional line between "employer" and "employee" will be a source of problems in interpreting the Act, especially, as will be developed later, as to borderline area "employees" such as supervisors and managerial employees.

[16] 9 N.L.R.B. 924 (1938).

[17] *Id.* at 931.

[18] 13 N.L.R.B. 974 (1939).

the secretaries to the managing editor and editor of a New York City newspaper. The decision identified the workers as "confidential secretaries"[19] and attempted to elaborate a rationale for their exclusion from bargaining units.

> Their work is of a confidential nature. We take notice of the fact that in negotiating and in other dealings concerning grievances, the interests of a union and the management are ordinarily adverse. The nature of a personal secretary's work is such that much of the confidential material pertaining to the management passes through his or her hands. We believe that the management should not be required to handle such material through employees in the unit represented by the union with which it is dealing.[20]

This rationale provided the underlying basis for developing the two-pronged labor nexus test which focuses on the confidentiality between the employee and superior as coupled with the labor related duties of the superior. Although the *Brooklyn Daily Eagle* rationale concentrated almost entirely on the confidentiality prong, it provided the basis upon which the labor nexus test could be built.

In addition to this test, there is another unique characteristic of confidential employees—the limited implied exclusion. This exclusion provides that confidential employees, although excluded from bargaining units, are employees under, and fully protected by, the Act.

The roots of the limited implied exclusion can be traced to the 1940 decision, *Bull Dog Electric Products Co.*[21] In *Bull Dog*, the employer contended that certain engineers, because of the confidential nature of their work, should not be considered employees under the Act.[22] The Board dismissed the employer's contention as unwarranted under the Act.[23] If the Board had agreed with this employer, then those workers deemed confidential employees would have been impliedly excluded from the definition of employee under the Act. The workers would have been no worse off in their ability to join and participate in bargaining units, but they automatically would have been without any of the other rights afforded employees under the Act. Apparently, the Board was carrying out the policy of the Act by adopting this stance because the policy of the Act was pro-labor in nature and the rights granted to employees were not limited to the right to bargain collectively.[24]

At this point, a still unanswered question was whether confidential

---

[19] *Id.* at 986.

[20] *Id.*

[21] 22 N.L.R.B. 1043 (1940).

[22] *Id.* at 1046.

[23] *Id.*

[24] *See supra* text accompanying notes 11-13.

employees, while excluded from the bargaining units of non-confidential employees, could form bargaining units made up exclusively of confidential employees. The NLRB, in *The Hoover Co.*,[25] answered this query in the negative. They decided that units made up solely of confidential employees were "inappropriate for the purposes of collective bargaining."[26] Exclusion of confidential employees from bargaining units was accomplished on the premise that inclusion would be unfair to management. Assuming the validity of this premise, this was an easy case for the Board. If one confidential employee in a unit of non-confidentials would be unfair to labor, a unit made up entirely of confidential employees might prove devastating to management.

In addition to deciding this easy issue, the Board in *Hoover* also attempted to clarify further the rationale underlying the labor nexus test. Citing *Brooklyn Daily Eagle*, the Board stated that

> management should not be required to handle labor relations matters through employees who are represented by the union with which the Company is required to deal and who in the normal performance of their duties may obtain advance information of the Company's position with regard to contract negotiations, the disposition of grievances and other labor relation matters.[27]

While *Brooklyn Daily Eagle* and its rationale concentrated more on the confidentiality prong of the labor nexus test, *Hoover* supplied the underlying rationale for the second prong, the labor relations prong. Under *Hoover*, workers who obtain advance information of management's labor policies are considered confidential employees. *Brooklyn Daily Eagle* and *Hoover*, taken in conjunction, provided the underlying basis for both prongs of the labor nexus test.

By 1944, the NLRB was succeeding in its efforts to categorize confidential employees. The foundation for the labor nexus standard and the limited implied exclusion had been built, providing guidance to employers, employees and unions alike. Two years later, however, the Board chose to narrow the labor nexus standard as to confidential employees.

Hoover would categorize as confidential those workers who obtain advance information of management's labor policies,[28] put another way, workers with *access* to labor relations matters. In *Ford Motor Co.*,[29] the Board narrowed the confidential employee category from those who have access to labor relations matters to those who "*assist and act* in a confidential capacity to persons who exercise 'managerial' functions in

---

[25] 55 N.L.R.B. 1321 (1944).

[26] *Id.* at 1323.

[27] *Id.*

[28] *Id.*

[29] 66 N.L.R.B. 1317 (1946).

the field of labor relations."[30] The Board narrowed the standard because the access test was "too inclusive and needlessly [precluded] many employees from bargaining together with other workers having common interests."[31] This narrowing of the confidential employee category was an effort by the Board to carry out the underlying policy of the Act. To further this policy, it was becoming evident that the Board would encourage collective bargaining with a certain amount of zeal, *e.g.* by increasing the number of employees eligible to bargain collectively. Thus, the legislative and administrative stance as to confidential employees became clear even though Congress apparently had not foreseen the definitional problem. As a consequence, the Board devised the labor nexus standard and limited implied exclusion. In addition to the legislative and administrative treatment of confidential employees, the courts also addressed the treatment of confidential employees.

C. *Judicial Treatment*

The Supreme Court had interpreted the NLRA as vesting broad discretion in the Board when administering the various provisions of the Act.[32] Thus, it is not surprising that the judicial review of Board decisions between 1935 and 1946 was limited. However, a small number of Board decisions were reviewed by various circuit courts of appeal.[33] Results were predictable in any event, because the Supreme Court had held that the Board had broad discretion in interpreting the Act.

In the 1942 case of *Poultrymen's Service Corp.*,[34] an employer refused to recognize a bargaining unit made up in part of employees who, although privy to some confidential information, were not confidential employees under the labor nexus standard. The information that the employees had access to was not of a labor relations nature so the second prong of the labor nexus test, the labor relations prong, was not met. The NLRB concluded that the bargaining unit, including the disputed em-

---

[30] *Id.* at 1322.

[31] *Id.* The significance of this narrower test can be illustrated as follows: Under the "access" test, the Board might feel compelled to exclude a maintenance worker from a bargaining unit because he emptied a personnel manager's waste basket. By emptying the basket, he may have *access* to important labor relations matters. Under the *Ford* test, the Board would invariably certify a unit with a maintenance man as a member because he would not *assist and act* in a confidential capacity to the personnel manager.

[32] *See* Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 152 (1941).

[33] Circuit courts of appeal were the proper forum for appeals from Board decisions. According to the Act, "[a]ny person aggrieved by a final order of the Board . . . may obtain a review of such order in the appropriate circuit court of appeals of the United States." National Labor Relations Act, 29 U.S.C. § 160(f) (1975). Also, because the Board's orders are not self-enforcing, the Board may, when faced with a party unwilling to comply with an order, petition enforcement of the order in the appropriate circuit court of appeals. *Id.* at § 160(e).

[34] 41 N.L.R.B. 444 (1942).

ployees, was proper and ordered the employer to bargain with the unit.[35] The employer refused to comply with the order and the Board sought enforcement of the order in the appropriate circuit court of appeals.[36]

This court was succinct as to the propriety of the labor nexus standard employed by the Board: "The test which the Board lays down is sound."[37] In general, the deferential treatment accorded to the Board by this court was not atypical of the judicial stance of circuit courts at this time.[38] To some extent, because of the judiciary's deferential stance, the NLRB, in its zeal for the furtherance of collective bargaining, attempted to permit the organization of supervisors into bargaining units. This attempt, successful at first but congressionally eliminated later, would have a substantial impact in the area of confidential employees.

In the 1945 case of *Packard Motor Car Co.*,[39] the NLRB, in an abrupt departure from its practice of not considering foremen employees under the Act,[40] certified a bargaining unit of general foremen. When the employer refused to bargain with this unit, the Board ordered the employer to do so.[41] The employer refused to comply with the order and the Board sought enforcement in the Sixth Circuit Court of Appeals.[42] The Sixth Circuit, citing the fact that foremen were not included in the definition of either employer or employee in the Act, deferred to the Board's decision stating that the "authority to determine the appropriate [bargaining] unit is primarily vested in the Board."[43] The employer appealed to the Supreme Court expecting that, in keeping with reality, the inclusion of foremen in bargaining units would be held in error because foremen were traditionally aligned with management not labor. The employer's expectation was not met.

---

[35] *Id.* at 465. The Board issued its usual cease and desist order. *See supra* note 2 for a brief explanation of this process.

[36] NLRB v. Poultrymen's Serv. Corp., 138 F.2d 204 (3d Cir. 1943).

[37] *Id.* at 211.

[38] *See, e.g.*, Armour & Co., 54 N.L.R.B. 1005 (1944), *enforced as modified*, 154 F.2d 570, 574 (10th Cir. 1945); Polish Nat'l Alliance, 42 N.L.R.B. 1375 (1942), *enforced as modified*, 136 F.2d 175, 180 (7th Cir. 1943), *aff'd*, 322 U.S. 643 (1944).

[39] 64 N.L.R.B. 1212 (1945).

[40] *See, e.g.*, General Motors Corp., 51 N.L.R.B. 457 (1943); Murray Corp. of Am., 51 N.L.R.B. 94 (1943); Boeing Aircraft Co., 51 N.L.R.B. 67 (1943); Maryland Drydock Co., 49 N.L.R.B. 733 (1943). *But see* L.A. Young Spring & Wire Corp., 65 N.L.R.B. 298 (1945); Godchaux Sugars, Inc., 44 N.L.R.B. 874 (1942); Union Collieries Coal Co., 41 N.L.R.B. 961 (1942).

[41] 64 N.L.R.B. at 1212.

[42] NLRB v. Packard Motor Car Co., 157 F.2d 80 (6th Cir. 1946), *aff'd*, 330 U.S. 485 (1947).

[43] *Id.* at 85. For a discussion of the vagueness of the definitions of employer and employee in the Act, *see supra* note 15. Foremen, as mentioned in that note, are borderline workers who could conceivably fit either the definition of employer or that of employee in the Act.

The Supreme Court, in *Packard Motor Car Co. v. NLRB*,[44] stated that foremen and other supervisory personnel are employees within the meaning of section 2(3) of the Act.[45] Also, in echoing the deferential stance of the circuit courts, the Court stated that the determination of "what unit is appropriate for bargaining . . . involves of necessity a large measure of informed discretion, and the decision of the Board, if not final, is rarely to be disturbed."[46]

The ramifications of this deferential holding were substantial. Foremen, traditionally aligned with management, could now, due to the zeal of the Board for the furtherance of collective bargaining, organize into bargaining units. This result could hardly have been intended by Congress because foremen were management's direct link with labor and, as such, did not need protection from management. If anything, workers needed protection from foremen, as was indicated in the *Packard* dissent where Justice Douglas stated that the majority decision "tends to obliterate the line between management and labor"[47] and "involves a fundamental change in much of the thinking of the nation on our industrial problems."[48] The dissent would have deferred to the legislature the task of expanding the definition of employee under the Act to include foremen.[49] Although confidential employees were never mentioned in *Packard*, this case would, in part, provide the impetus for congressional action in the area of labor relations. As a result, the labor nexus standard and the limited implied exclusion as to confidential employees would be substantially affected by such congressional action.

III. TAFT-HARTLEY AMENDMENTS: INDIRECT EFFECT ON CONFIDENTIAL EMPLOYEES

As the dissent stated in *Packard*, the decision whether or not supervisory personnel, that is foremen, should be included as employees under the Act is a legislative one.[50] Be it from this judicial prodding or not, Congress passed the Taft-Hartley Amendments[51] to, *inter alia*, express clearly the proper definitional status of supervisory personnel. To appreciate this definitional status properly, it is helpful to examine the underlying reasons behind passage of the amendments.

---

[44] 330 U.S. 485 (1947).

[45] *Id.* at 488. For the pertinent text of § 2(3) of the Act, *see supra* text accompanying note 15.

[46] *Id.* at 491.

[47] 330 U.S. at 494 (Douglas, J., dissenting).

[48] *Id.* at 500.

[49] *Id.*

[50] *Id.*

[51] Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, §§ 1-503, 61 Stat. 136-62 (current version at 29 U.S.C. §§ 141-44, 167, 171-83, 185-87, and amending §§ 151-66).

To reiterate, the purpose of the NLRA was twofold: to prevent strikes and encourage collective bargaining.[52] The findings of Congress, enunciated in section 1 of the Act, stated that employers are mostly responsible for strikes and the lack of collective bargaining.[53] The NLRA was an answer to this perceived problem and was properly interpreted as being, in simple terms, pro-employee and anti-employer. When this anti-employer sentiment was taken, by the zeal of the Board for the furtherance of collective bargaining, to legislatively unexpected extremes, Congress interceded and enacted the Taft-Hartley Amendments. A noted commentator of the time recognized this process:

> The enthusiasm of the NLRB for collective bargaining led it with virtual uniformity to sacrifice competing interests to the effectuation of [preventing strikes by encouraging collective bargaining]. Whether justified or not, the Taft-Hartley amendments resulted to a large extent from the sense of grievance to which this course gave rise. More fundamentally, however, the amendments represent an abandonment of the policy of affirmatively encouraging the spread of collective bargaining, and the striking of a new balance between protection of the right to self-organization and various opposing claims.[54]

The "competing interests" and "various opposing claims" mentioned above were predominantly, if not exclusively, the rights of employers that the Board would have to consider in future administration of the Act. In addition, Congress expressly excluded four other types of employees from the definition of employee under the Act. Supervisors were one of the newly excluded groups.[55]

The definition of supervisor in the amendments aptly describes that individual as having authority over other workers, authority "not of a merely routine or clerical nature, but [authority that] requires the use of independent judgment."[56] This is an accurate description of foremen. Although one would be hard pressed to find a direct link between super-

---

[52] *See supra* text accompanying note 11.

[53] National Labor Relations Act, ch. 372, § 1, 49 Stat. 449 (1935). The first sentence of § 1 states that the "denial by *employers* of the right of employees to organize and the refusal by *employers* to accept the procedure of collective bargaining lead to strikes." *Id.* (emphasis added).

[54] Cox, *Some Aspects of the Labor Management Relations Act, 1947*, 61 HARV. L. REV. 1, 4 (1947).

[55] Labor Management Relations (Taft-Hartley) Act, 1947, ch. 120, § 101-2(3), 61 Stat. 136 (codified at 29 U.S.C. § 152(3) (1975)). This portion of the amendments amended § 2(3) of the original Act. The other workers expressly excluded from the definition of employee were independent contractors, individuals employed by employers subject to the Railway Labor Act, 45 U.S.C. §§ 151-63, 181-88 (1981), and individuals employed by a person not defined as an employer under the Act.

[56] 29 U.S.C. § 152(11) (1975).

visors and confidential employees by means of this definition, the legislative history of this definition is most useful in analyzing the congressional attitude towards the labor nexus standard and the limited implied exclusion as to confidential employees.

The House and Senate were in agreement that supervisors should be excluded employees under the Act.[57] They differed, however, as to the scope of the term supervisor. The House preferred to include confidential employees as supervisors. The House defined a confidential employee as an individual "who by the nature of his duties is given by the employer information that is of a confidential nature, and that is not available to the public, to competitors, or to employees generally, for use in the interest of the employer."[58] The significance of this position is crucial. The House would not only abandon the labor nexus standard by discarding the second prong of the test, the labor relations prong, but it would also abandon the limited implied exclusion by making confidential employees expressly excluded from the definition of employee under the Act. This broad definition of confidential employees, one that is based not only on confidential labor relations information but confidential business information as well, is in stark contrast to the narrower definition of confidential employee utilized by the Board.[59]

The Senate definition of supervisor was one of narrower scope, however, confining the term to mean those "individuals generally regarded as foremen and persons of like or higher rank."[60] The narrower Senate definition prevailed in conference:

> In the case of persons working in labor relations, personnel and employment departments, it was not thought necessary to make specific provision, as was done in the House bill, since the Board has treated, and presumably will continue to treat, such persons as *outside the scope of the act*. This is the prevailing Board practice with respect to such people as *confidential secretaries* as well, and it was not the intention of the conferees to alter this practice in any respect.[61]

The conference was clear in its adoption of the Senate definition of supervisor but only confused the standard and treatment of confidential employees. The reference to "confidential secretaries" emphasized above, without any labor relations description of such workers, could

---

[57] *See* H.R. REP. NO. 510, 80th Cong., 1st Sess., § 2(3) (1947), *reprinted in* 1947 U.S. CODE CONG. SERV. 1135, 1138.

[58] H.R. 3020, 80th Cong., 1st Sess., § 2(12) (1947).

[59] For the Board definition of confidential employee see B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956). The definition can be found *supra* text accompanying note 3.

[60] H.R. REP. NO. 510, 80th Cong., 1st Sess., § 2(11) (1947), *reprinted in* 1947 U.S. CODE CONG. SERV. 1135, 1141.

[61] *Id.* (emphasis added).

also affect the labor nexus standard. The confusion concerning the standard and treatment of confidential employees, as nurtured by the language of the Conference Report, would not surface for another twenty years.

As for the effect of the Taft-Hartley Amendments on the area of confidential employees, apart from the confusion caused by the legislative history, Congress was attempting to curb the Board's zeal in furthering collective bargaining. Whether the zeal of the Board was curbed is debatable. In keeping with the chronological mode of this discussion, an analysis of the labor nexus standard and the limited implied exclusion as to confidential employees during the interim period must follow.

IV. POST TAFT-HARTLEY YEARS: BOARD NARROWING OF THE LABOR NEXUS TEST FROM 1948-1968

In the twenty years that followed the passage of the Taft-Hartley Amendments, the Board strove to fine tune the labor nexus standard with one result in mind: to narrow the scope of confidential employees and in turn broaden the scope of "organizable" workers. Although the amendments were designed to dampen some of the Board's zeal for organizing workers at all cost,[62] an analysis of the following Board decisions indicates that their zeal was for the most part unaffected by the amendments.

In the 1950 case of *Republic Steel Corp.*,[63] the Board had to determine whether employees who handled routine labor relations matters for their superiors were confidential employees. The first prong of the labor nexus test was met in that the employee did work in a confidential capacity to his superior. However, the second prong of the test was not satisfied because the superior handled mere grievance matters, which were undeniably labor related, but were not important enough labor relations matters to meet the labor relations prong of the test. In effect, the Board decided that in order for the second prong of the labor nexus test to be met, the superior must be engaged in establishing labor relations *policy*.[64] Thus, by narrowing the scope of labor relations matters handled by the superior, the Board narrowed the scope of the confidential employee category and effectively broadened the scope of organizable workers.

The NLRB was faced with a most interesting problem in 1952 and dealt with it in a most predictable way. In *Luckenbach Steamship Co.*,[65] the employer was a large national transportation company with a district office in Los Angeles. The employee in question was the assis-

---

[62] *See supra* note 54 and accompanying text.

[63] 91 N.L.R.B. 904 (1950).

[64] *Id.* at 907.

[65] 100 N.L.R.B. 1301 (1952).

tant to the district office manager.[66] The Board allowed the employee to vote in an election which would certify a bargaining unit despite the fact that upon certification of the unit the employee's superior would be involved in setting labor relations policy for that particular unit.[67] The Board decided that "eligibility findings in this instance are based on [the employee's] status at the time of the election and not on the speculative possibility that such status may change in the future."[68] Consequently, the labor relations prong of the test will only be met if the superior sets labor relations policy at the time of the election. Interestingly, prospective confidential employees will be eligible to vote for certification of a bargaining unit to which they may not belong.[69] This position significantly broadened the scope of organizable workers by again narrowing the labor nexus standard. Similarly, the Board began to narrow the first prong—the confidentiality prong—of the labor nexus test.

The confidentiality prong of the labor nexus test was addressed by the Board in the 1954 decision in *American Lithofold Corp.*[70] In this case, all parties agreed that a certain secretary was a confidential employee because she assisted and acted in a confidential capacity to a superior who formulated and effectuated labor policies.[71] As to another secretary who occasionally substituted for the first secretary, the Board held that "[i]n the absence of evidence that she *regularly* assists one who formulates or effectuates general labor relations policy . . . she is not a confidential employee."[72] Although it was unclear from the decision exactly what constituted "regularly," one thing was clear. The Board would adjust both prongs of the labor nexus test in an effort to narrow the confidential employee category and expand the number of organizable employees.

In 1956, the Board decided *B.F. Goodrich Co.*[73] This decision stands today as the Board's standard bearer of the present labor nexus test.[74]

---

[66] *Id.* at 1302.

[67] *Id.* at 1303.

[68] *Id.* at 1302 n.4.

[69] Other perverse results could occur. For example, suppose that a prospective unit consisted of seven employees, two undoubtedly of the confidential type. If three of the remaining employees voted not to certify the unit, while the other two voted to certify and were joined by the two confidential employees permitted to vote after *Luckenbach*, the unit would consist of five non-confidential employees, a majority of whom did not vote for certification. Decertification of the unit would be possible under the Act, but if this happened, the whole process could conceivably be started again.

[70] 107 N.L.R.B. 1061 (1954).

[71] *Id.* at 1064.

[72] *Id.* (emphasis added).

[73] 115 N.L.R.B. 722 (1956).

[74] *See supra* text accompanying note 3.

This test was a reiteration of the 1946 *Ford* test,[75] which would classify as confidential employees those individuals who "assist and act in a confidential capacity to persons who exercise 'managerial' functions in the field of labor relations."[76] The *Ford* test narrowed the scope of the labor nexus test from the approach used in *Hoover*, which would have excluded all employees with access to confidential labor relations matters.[77] The Board determined that a resurrection of the *Ford* test was necessary because some Board decisions had slipped back into using the "access" standard,[78] which "needlessly preclude[d] employees from bargaining collectively together with other employees sharing common interests."[79] Consequently, the Board expressly overruled those decisions which had slipped back to the access standard.[80] The labor nexus standard would "embrace only those employees who assist and act in a confidential capacity to persons who formulate, determine *and* effectuate management policies in the field of labor relations."[81] This is the standard most often cited when the confidential employee issue is faced today. Before examining the significance of this narrowed labor nexus test, it is helpful to analyze one final case of this period and its effect on narrowing the labor nexus standard.

In *Weyerhaeuser Co.*,[82] an employer attempted to exclude from a bargaining unit four secretaries who assisted various supervisors whose jobs concerned the effectuation of labor relations policy.[83] The employer may have been relying on old Board decisions which stated the second prong of the labor nexus test in terms of superiors who formulate *or* effectuate labor relations policy.[84] The Board, however, stated that the duties of the superior were "to be assessed in the conjunctive"[85] and not the disjunctive. Thus, for the second prong of the labor nexus test to be met, the superior would have to formulate, determine *and* effectuate management's labor relations policies.

During the twenty years following the Taft-Hartley Amendments, the

---

[75] Ford Motor Co., 66 N.L.R.B. 1317 (1946).

[76] *Id.* at 1322.

[77] The Hoover Co., 55 N.L.R.B. 1321, 1323 (1944). For a discussion of this narrowing process, *see supra* text accompanying notes 28-31.

[78] *See, e.g.*, Minneapolis-Honeywell Regulator Co., 107 N.L.R.B. 1191 (1954); Bond Stores, Inc., 99 N.L.R.B. 1029 (1952).

[79] B.F. Goodrich Co., 115 N.L.R.B. 722, 724 (1956).

[80] *Id.* at 724 n.7.

[81] *Id.* at 724.

[82] 173 N.L.R.B. 1170 (1968).

[83] *Id.* at 1172.

[84] *See, e.g.*, American Lithofold Corp., 107 N.L.R.B. 1061, 1064 (1954). *See also supra* text accompanying note 72.

[85] 173 N.L.R.B. at 1172.

Board refined the labor nexus standard by narrowing it. They did so, as mentioned above, by narrowing the scope of both the confidentiality and labor relations prongs of the test. The confidentiality prong was narrowed by requiring that the employee regularly[86] assist and act in a confidential capacity[87] to superiors. The labor relations prong was narrowed because the superior had to formulate, determine *and* effectuate labor relations policy.[88] Thus, confidential employee status was narrowly construed. Management had to prove that the worker was confidentially involved with a very important superior, one who set management's labor relations policies, before the employee would be precluded, by the Board, from joining the bargaining unit. Given the Board's zeal for the furtherance of collective bargaining, the proof of confidential status could only be considered a difficult burden. Indeed, as management failed to carry this burden, the number of organizable workers eligible for collective bargaining increased, a result welcomed by the Board.

In the late 1960's, the labor nexus standard and the limited implied exclusion treatment were tools still applied by the Board to confidential employees. At this time, however, the Board decided to apply these tools to a different type of employee, the managerial employee. This decision had no small effect on the validity of the labor nexus standard and the limited implied exclusion for confidential employees.

V. Application of Labor Nexus Standard and the Limited Implied Exclusion to Managerial Employees

Since the passage of the NLRA, the Board had consistently held that managerial employees, although not expressly mentioned in the Act, were nonetheless impliedly excluded from the definition of employee and not entitled to the protection afforded employees under the Act.[89] In the 1956 case of *Swift & Company*,[90] the Board stated that it "was the clear intent of Congress to exclude from the coverage of the Act all individuals allied with management. Such employees cannot be deemed to be employees for the purposes of the Act."[91] Although the clear intent of Congress is difficult to glean from the definitions of employer and employee in the Act,[92] the Board obviously decided that managerial employees, although along the definitional borderline between employer and employee, more closely resembled employers and were therefore

---

[86] *See* 107 N.L.R.B. at 1064.

[87] *See* 115 N.L.R.B. at 724.

[88] *Id.*

[89] Vulcan Corp., 58 N.L.R.B. 733 (1944).

[90] 115 N.L.R.B. 752 (1956).

[91] *Id.* at 753-54.

[92] 29 U.S.C. §§ 152(2), 152(3) (1975). For a discussion of the ambiguities of these definitions, see *supra* note 15.

treated as such. Under the Act, employers and employees are mutually exclusive categories and managerial employees, as employers, faced a total implied exclusion from the definition of employee under the Act.

This total implied exclusion as to managerial employees was also judicially recognized. In *International Ladies' Garment Workers' Union v. NLRB*,[93] the court stated that although "the Act makes no special provision for 'managerial employees,' under a Board policy of long duration, this category of personnel has been excluded from the protection of the Act."[94] Accordingly, the Board categorized managerial employees as "those who formulate, determine, and effectuate an employers' policy."[95] Employees determined by the Board to be managerial include application engineers,[96] buyers,[97] credit managers,[98] interviewers,[99] lecturers[100] and personnel investigators.[101] For thirty years, when the Board found that an employee was managerial, he was not considered an employee for purposes of the Act by virtue of a total implied exclusion from the definition of employee under the Act.

In the 1967 case of *North Arkansas Electric Cooperative*,[102] however, the Board abruptly changed this policy. In this case, an electrification advisor[103] was warned by management to remain dissociated from a union during a certification election. Nonetheless, the advisor became involved in the certification process.[104] The advisor was discharged and subsequently filed an unfair labor practice charge against the employer.[105] Naturally, the employer contended that since the advisor was a managerial employee, he had no rights under the Act. The Board stated that "nothing in the . . . legislative history of the Act [excludes] electrification advisors . . . from the coverage of the Act as employees

---

[93] 339 F.2d 116 (2d Cir. 1964).

[94] *Id.* at 118.

[95] American Fed'n of Labor, 120 N.L.R.B. 969, 973 (1958). Note the striking similarity between the Board's definition of managerial employee and the second prong of the labor nexus test describing a confidential employee's superior. The only difference is that managerial employees set general management policy, superiors to confidential employees set only labor related policy.

[96] *E.g.*, Electric Controller & Mfg. Co., 69 N.L.R.B. 1242 (1946).

[97] *E.g.*, Mack Truck, Inc., 116 N.L.R.B. 1576 (1956).

[98] *E.g.*, Diana Shop of Spokane, 118 N.L.R.B. 743 (1957).

[99] *E.g.*, Peter Kiewit Sons' Co., 106 N.L.R.B. 194 (1953).

[100] *Id.*

[101] *E.g.*, Western Elec. Co., 100 N.L.R.B. 420 (1952).

[102] 168 N.L.R.B. 921 (1967).

[103] *See* Rural Elec. Co., 130 N.L.R.B. 799, 800 (1962), where an electrification advisor was found to be a managerial employee.

[104] 168 N.L.R.B. at 922.

[105] *See supra* note 2 explaining the unfair labor practice charge procedure as distinguished from the certification procedure.

within the meaning of the Act."[106] The Board ordered the employer to reinstate the "employee."

The Board was abruptly reversing thirty years of its own policy. Its basis for doing so was suspect at best. Since nothing in the Act excluded electrification advisors from the definition of employee, the Board chose to classify them as such regardless of their closer relationship to management. What was the Board requesting, that Congress compile a list of every possible job title and classify each as employer or employee? Interestingly, the employer in *North Arkansas* was equally dismayed by the Board's stance and refused to comply with the order. The Board sought enforcement of the order in the Eighth Circuit Court of Appeals.[107]

The Eighth Circuit refused to enforce the Board's order because in its opinion the electrification advisor was a managerial employee.[108] The court remanded the case to the Board instructing them to "determine whether or not the discharge of [the managerial employee] under all the circumstances of the case, was or was not violative of the Act."[109] The court encouraged the Board on remand to revert, on its own, to its previous stance regarding managerial employees. The Board declined this invitation.[110]

On remand, the Board applied the second prong of the *labor nexus* test to this worker. Since the electrification advisor had not "participated in the formulation, determination or effectuation of policy with respect to employee relation matters,"[111] the Board would not classify him as a managerial employee. This new stance is significant. Up to this point, all employees deemed managerial were impliedly excluded from the definition of employee in the Act. Now, however, the Board would exclude only those managerial employees with a labor nexus. Moreover, the exclusion up to this point had been total, that is, managerial employees were not employees for the purposes of the Act. The second *North Arkansas* decision altered this policy as well. The Board stated that "even if we would have found that [the employee] had sufficient community of interest with the employees in the unit to include him therein, nevertheless, . . . we find him to be an employee."[112] For all intents and purposes, this is a description of the limited implied exclusion, heretofore used only where confidential employees were involved.

In sum, the Board was attempting to apply the tools utilized in the confidential employee area, the labor nexus standard and the limited im-

---

[106] 168 N.L.R.B. at 925.

[107] NLRB v. North Ark. Elec. Coop., 412 F.2d 324 (8th Cir. 1969).

[108] *Id.* at 328.

[109] *Id.*

[110] North Ark. Elec. Coop., 185 N.L.R.B. 550 (1970).

[111] *Id.* at 551.

[112] *Id.*

plied exclusion treatment, to the managerial employee area. Presumably, this attempt was a by-product of the Board's zeal for the furtherance of collective bargaining. Whatever the motivation, the Board applied these tools to the electrification advisor in *North Arkansas*, reaffirmed its earlier order[113] and again sought enforcement of the order in the Eighth Circuit.[114]

The Eighth Circuit again refused to enforce the order of the Board.[115] The court agreed that managerial employees and confidential employees should be treated the same, not by use of a limited implied exclusion as the Board had argued, but by using a total implied exclusion as to both groups of employees.[116] Although the court did not address the propriety of the labor nexus standard as to confidential employees, the court did expressly prohibit the use of that standard as to managerial employees.[117]

The Board, in seeking to equate managerial employees with confidential employees by applying the same tools to both, most likely expected that the deferential judicial attitude towards Board decisions would continue. When the Eighth Circuit refused to defer in *North Arkansas*, perhaps the Board should have retreated from its novel application of the labor nexus standard and the limited implied exclusion. The Board remained undaunted, however, and continued to apply these tools to managerial employees, a practice eventually rejected by the Supreme Court in a ruling which seriously undermined the application of these tools to confidential employees as well.

In the 1971 case of *Bell Aerospace Co.*,[118] the NLRB was petitioned to certify a bargaining unit made up of buyers.[119] The employer maintained that since the buyers were managerial employees they could not appropriately make up a bargaining unit under the Act. The Board, however, relying on its decision in *North Arkansas*, held that managerial employees were to be considered employees for purposes of the Act and were entitled to all the benefits that inure to employees as such.[120] Consequently, the Board certified the bargaining unit.[121]

In 1972, Bell Aerospace petitioned the Board for reconsideration in

---

[113] *Id.*

[114] NLRB v. North Ark. Elec. Coop., 446 F.2d 602 (8th Cir. 1971).

[115] *Id.* at 603.

[116] *Id.* at 610. The Eighth Circuit adopted the total implied exclusion for confidential employees. This was also the stance of the Fourth Circuit. *See* NLRB v. Wheeling Elec. Co., 444 F.2d 783 (4th Cir. 1971). *See also infra* text accompanying notes 188-91.

[117] 446 F.2d at 610.

[118] 190 N.L.R.B. 431 (1971).

[119] *See* Mack Truck, Inc., 116 N.L.R.B. 1576 (1956), for a Board decision holding that buyers were managerial employees.

[120] 190 N.L.R.B. at 431.

[121] *Id.* at 432.

light of the Eighth Circuit's second *North Arkansas* ruling.[122] The Board declined to follow the *North Arkansas* ruling that there is a total implied exclusion as to managerial employees from the definition of employee under the Act. Instead, the Board retained the view that only those managerial employees with a labor nexus were to be excluded, not from the definition of employee under the Act, but merely from participation in bargaining units.[123] The employer appealed this decision to the Second Circuit.[124]

The Second Circuit, in *Bell Aerospace Co. v. NLRB*,[125] pointed out that the Board's newly adopted view as to managerial employees was indeed a drastic departure from its former practice.[126] The court held that the application of the second prong of the labor nexus test to determine whether an employee was to be considered managerial did not comport with the intent of Congress when the Act and its amendments were passed.[127] As to the limited implied exclusion for managerial employees, the court found this practice on the part of the Board to be erroneous.[128] Presumably, the court looked upon *all* managerial employees as more closely allied with management than with labor. As such, they more closely fit the definition of employer under the Act than employee, thus occupying a status undeserving of the protections afforded employees under the Act. Given the Board's reluctance to follow contrary circuit court rulings, a case involving the standard for determining, and the treatment of, managerial employees was bound to reach the Supreme Court. *Bell Aerospace* did so, and the Court's ruling had a rippling effect in the confidential employee area.

The Supreme Court, in *NLRB v. Bell Aerospace Co.*,[129] agreed with the Second Circuit that all managerial employees, even those without a labor nexus, were impliedly excluded from the definition of employee under the Act.[130] This is commonly referred to as the total implied exclusion. While striking down the labor nexus standard and the limited implied exclusion as tools applicable to managerial employees, the Court, in obiter dictum, also seriously undermined the application of these tools in the confidential employee area. The dicta, contained in a footnote, read as follows.

> In 1946 . . . the Board had narrowed its definition of "confiden-

---

[122] Bell Aerospace Co., 196 N.L.R.B. 827 (1972).

[123] *Id.* at 828.

[124] Bell Aerospace Co. v. NLRB, 475 F.2d 485 (2d Cir. 1973).

[125] *Id.*

[126] *Id.* at 488-92.

[127] *Id.* at 494.

[128] *Id.*

[129] 416 U.S. 267 (1974).

[130] *Id.* at 284.

> tial employees" to embrace only those who exercised "'managerial' functions in the field of labor relations." The discussion of "confidential employees" in both the House and Conference Committee Reports, however, unmistakably refers to that term as defined in the House bill, which was not limited just to those in "labor relations." Thus, although Congress may have misconstrued recent Board practice, it clearly thought that the Act did not cover "confidential employees" even under a broad definition of that term.[131]

Whether this is an accurate and valid description of the legislative intent behind the 1947 amendments is unclear because the legislative history is ambiguous.[132] Nonetheless, the Court seriously questioned the application of the labor nexus standard and the limited implied exclusion for confidential employees. The Court had stated in essence that Congress was tacitly condoning a Board practice of *total* implied exclusion, *i.e.*, "under a broad definition of the term" the Act does not apply to *all* confidential employees regardless of their labor nexus.[133] The Court's reasoning contains two serious flaws.

First, the Court misstated the labor nexus standard by only reciting the second prong, the labor relations prong. The Court makes no mention of the confidentiality prong and its definition of confidential employee is more accurately a definition of labor relations managerial employees.[134] Second, from a reading of the ambiguous legislative history of the amendments,[135] anybody, including the Supreme Court, would be hard-pressed to ascertain what Congress "clearly thought."[136] Both of these flaws give support to the inference that while the Court thought that Congress may have misconstrued Board practice, the Court may very well have misconstrued congressional intent.

The Board's bold experiment of applying confidential employee type tools to managerial employees resulted in what could be viewed as a net loss for the Board. As for managerial employees, the Board was forced to revert to its previous practice classifying managerial employees as totally and impliedly excluded from the definition of employee under the Act. As for confidential employees, the above mentioned dicta in *Bell Aerospace* marked the beginning of heightened judicial scrutiny, and even outright abandonment, of the labor nexus standard and the limited implied exclusion for these employees.

---

[131] *Id.* at 284 n.12.

[132] *See supra* note 61 and accompanying text.

[133] 416 U.S. at 284 n.12. This total implied exclusion of *all* confidential employees was the House plan in 1947. *See supra* text accompanying note 58.

[134] 416 U.S. at 284 n.12.

[135] *See supra* note 61 and accompanying text.

[136] 416 U.S. at 284 n.12.

VI. CONFIDENTIAL EMPLOYEES AND THE SUPREME COURT

For over forty years the NLRB had treated confidential employees in two distinct ways. The standard to determine whether an employee was confidential was the two pronged labor nexus test. This standard, apart from its ill-advised application to managerial employees, was unique to confidential employees. The treatment afforded confidential employees, the limited implied exclusion, was also unique. As discussed above, both the labor nexus standard and the limited implied exclusion for confidential employees were seriously undermined by the *Bell Aerospace* dicta. In a relatively short time, both tools came under judicial attack.[137]

In the 1978 case of *Hendricks County Rural Electric Membership Corp.*,[138] the personal secretary to the company's chief executive officer was discharged for signing a petition calling for the reinstatement of a discharged employee. The secretary filed an unfair labor practice charge, asserting that she was discharged for engaging in concerted activity protected by the Act.[139] The employer contended that even if the secretary was engaged in concerted activity, because of her relationship with her superior she was a confidential employee and thus not protected by the Act.[140] The Board found that the first prong of the labor nexus test, the confidentiality prong, was not met when applied to this secretary.[141] Therefore, as a non-confidential employee the secretary was fully protected by the Act.[142] The Board ordered the company to reinstate the secretary[143] and the company appealed.

In *Hendricks County Rural Electric Membership Corp. v. NLRB (Hendricks I)*,[144] the Seventh Circuit stated that the labor nexus standard was seriously undermined by the dicta in *Bell Aerospace*. Accordingly, the court in *Hendricks I* concluded that the use of the labor nexus standard was an error of law.[145] The court held that "*all* secretaries working in a

---

[137] Some circuit courts still accepted the labor nexus standard and limited implied exclusion for confidential employees even after *Bell Aerospace*. *See, e.g.*, Union Oil Co. of Cal. v. NLRB, 607 F.2d 852 (9th Cir. 1979); NLRB v. Allied Prods. Corp., 548 F.2d 644 (6th Cir. 1977).

[138] 236 N.L.R.B. 1616 (1978).

[139] *Id.* at 1617-19.

[140] *Id.*

[141] *Id.* For a more thorough discussion of why this secretary did not meet the confidentiality prong see Hendricks County Rural Elec. Membership Corp., 247 N.L.R.B. 498 (1980).

[142] 236 N.L.R.B. at 1618.

[143] *Id.* at 1616.

[144] 603 F.2d 25 (7th Cir. 1979). This case, like *North Arkansas* and *Bell Aerospace*, came up to the circuit court twice and, like *Bell Aerospace*, was reviewed in the Supreme Court. For purposes of convenience, the first case in the circuit court will be labelled *Hendricks I*, the second will be *Hendricks II*, and the Supreme Court case will be referred to as *Hendricks*.

[145] *Id.* at 28.

confidential capacity, without regard to labor relations, be excluded from the Act," and remanded the case to the Board with instructions to decide the case in conformity with this holding.[146] This approach to confidential employees mirrored the approach of the House bill in 1947.[147] Moreover, this approach, a total implied exclusion from the Act, broadened the confidential employee category and lessened the number of organizable workers.

On remand, the Board purported to accept "for this case only" the broader standard as to confidential employees.[148] In reality, the Board again applied the narrower nexus test. The Board found that a confidential relationship did not exist between the secretary and her superior.[149] In short, the first prong of the labor nexus test, the confidentiality prong, had not been met.[150] The Board again decided that the secretary was an employee for purposes of the Act and reaffirmed its earlier reinstatement order.[151] The Board, then, only paid lip-service to the Seventh Circuit and in reality tacitly defied them. When the case again was appealed to that court, the result was predictable.

In *Hendricks County Rural Electric Membership Corp. v. NLRB* (*Hendricks II*),[152] the Seventh Circuit reiterated its earlier holding. The law of the Seventh Circuit was that a confidential secretary, regardless of her superior's labor nexus, was impliedly excluded from the definition of employee under the Act.[153] This total implied exclusion was in stark contrast to the Board's labor nexus standard and limited implied exclusion for confidential employees. This contrast set the stage for a Supreme Court case which would determine the validity of the Board's approach to confidential employees.

The Court's inquiry was twofold. First, which standard should be used to determine the confidential status of an employee—the Board's nar-

---

[146] *Id.* at 30. The Seventh Circuit, in striking down the labor nexus standard and the limited implied exclusion for confidential employees, relied heavily on the *Bell Aerospace* dicta. Even prior to that opinion, however, the Seventh Circuit held that confidential secretaries were excluded from the definition of employee under the Act. *See* Peerless, Inc. v. NLRB, 484 F.2d 1108, 1112 (7th Cir. 1973). Notably, the Seventh Circuit was a forerunner in challenging the Board's approach to confidential employees and would have been so with or without the *Bell Aerospace* dicta.

[147] *See supra* note 58 and accompanying text.

[148] Hendricks County Rural Elec. Membership Corp., 247 N.L.R.B. 498, 498 (1980).

[149] *Id.* at 498-99.

[150] The Board stated that the secretary was insulated by her superior from confidential matters concerning labor relations and, for that matter, even confidential matters not labor related. *Id.*

[151] *Id.* at 499.

[152] 627 F.2d 766 (7th Cir. 1980).

[153] *Id.* at 767-70.

row labor nexus standard or the Seventh Circuit's broader standard conferring confidential status on employees privy to any confidential information regardless of its labor relatedness? Second, once confidential status had been determined, which treatment should be afforded the confidential employee—the Board's limited implied exclusion, merely excluding the employee from bargaining units, or the Seventh Circuit's total implied exclusion of the employee from the definition of employee?

In *NLRB v. Hendricks County Rural Electric Membership Corp.*,[154] Justice Brennan, writing for a five-to-four majority,[155] returned judicial review of Board policy to the deferential position of earlier days. The Court held "that there is a reasonable basis in law for the Board's use of the 'labor nexus' test."[156] Moreover, "the NLRB's longstanding [use of the] labor nexus test, rooted firmly in the Board's understanding of the nature of the collective bargaining process . . . fairly demonstrates that the Board's treatment of confidential employees does indeed have 'a reasonable basis in law.' "[157] In reaching this conclusion, the Court undertook a thorough evaluation of Board treatment of confidential employees prior to the Taft-Hartley Amendments, and was satisfied with the consistency of this treatment.[158] This finding was prompted by a charge that Board treatment of confidential employees had been inconsistent prior to the amendments.[159] The Court then addressed the ambiguous legislative history of the amendments, whether the Seventh Circuit had properly interpreted that history and more importantly whether the Court itself had correctly interpreted that history.

The Court, in examining the legislative history of the amendments, noted the controversy as to the inclusion of confidential employees in the definition of supervisors, a group to be excluded from the definition

---

[154] 454 U.S. 170 (1981).

[155] *Hendricks* was decided along with a companion case, NLRB v. Malleable Iron Range Co., No. 79-1991 (7th Cir., filed May 18, 1980). *Malleable* was an unreported decision, also from the Seventh Circuit, dealing with the propriety of the labor nexus test in a different fact situation. In this case an employer refused to deal with a bargaining unit comprised partly of employees with access to *general* confidential business information. The NLRB, applying the labor nexus test to the employees, found them properly included in the bargaining unit and ordered the employer to bargain with the unit. The Board sought enforcement of this order with the Seventh Circuit but was denied enforcement in light of *Hendricks I*. The Supreme Court found *Malleable* to be the easier case and unanimously upheld the labor nexus test as applied to these employees. It was only in *Hendricks* that the Court was divided.

[156] 454 U.S. at 176.

[157] *Id.* at 190.

[158] *Id.* at 178-81.

[159] Brief for Hendricks County REMC at 6, NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981). This argument was apparently made to undermine the view that the labor nexus test was one of longstanding and uniform application.

of employee under the Act.[160] The Court also noted that, in conference, it was expressly decided not to include confidential employees in the definition of supervisors.[161] Consequently, the Court concluded that "*nothing* in [the] legislative discussion supports any inference, let alone conclusion, that Congress intended to alter the Board's pre-1947 determinations that only confidential employees with a 'labor nexus' should be excluded from bargaining units."[162]

The Court then looked to the Seventh Circuit's interpretation of the legislative history. The Seventh Circuit, in *Hendricks I*,[163] interpreted the legislative history to mean that all confidential employees, regardless of their labor nexus, were totally and impliedly excluded from the definition of employee under the Act.[164] The Court rejected this position because it, in effect, mirrored the position of the House, a position expressly rejected by the Conference Committee.[165] Having rejected the Seventh Circuit's interpretation of this legislative history, the Court now faced a more delicate problem, namely, whether its own interpretation of the legislative history, handed down seven years earlier in *Bell Aerospace*, was accurate.

The *Bell Aerospace* interpretation of the legislative history concerning confidential employees was contained in a footnote to that decision.[166] The Court stated that the *Bell Aerospace* dicta, in light of the above analysis of the pertinent legislative history, was erroneous.[167] Also, because the dicta could not be "squared with Congressional intent, [it] should be 'receded from' now that the issue is 'squarely presented.' "[168]

In the short span of seven years, the Supreme Court effectively reversed itself where confidential employees were concerned.[169] In 1974,

---

[160] *See supra* notes 57-60 and accompanying text.

[161] *See supra* note 61 and accompanying text.

[162] 454 U.S. at 181 (emphasis added).

[163] Hendricks County Rural Elec. Membership Corp. v. NLRB, 603 F.2d 25 (7th Cir. 1979).

[164] *Id.* at 30.

[165] 454 U.S. at 184.

[166] 416 U.S. 267, 284 n.12 (1974).

[167] 454 U.S. at 187.

[168] *Id.* at 188 (citations omitted).

[169] Observing the Court as a whole it would seem that there was a complete turnaround in its position as to the status of confidential employees. The turnaround came, not from a doctrinal shift of the entire Court, but from a slight shift in the members' voting pattern. For example, consider the voting pattern of the three latest Supreme Court decisions in the managerial/confidential employee area: *Bell Aerospace*, *Hendricks* and NLRB v. Yeshiva University, 444 U.S. 672 (1981) (a managerial employee case). In all three cases, Chief Justice Burger and Justices Powell and Rehnquist consistently voted with management, and Justices Brennan, White and Marshall invariably sided with the NLRB. Thus, the deci-

in *Bell Aerospace*, the Court intimated that all confidential employees, regardless of their labor nexus, would be excluded from the definition of employee under the Act. In 1981, in *Hendricks*, the Court held that the narrower labor nexus standard would be determinative as to the confidential status of an employee. The task remaining in *Hendricks* was to determine whether the personal secretary met the labor nexus standard.

Both parties in *Hendricks* agreed that the secretary did not meet the confidentiality prong of the labor nexus test,[170] *i.e.*, she did not have a confidential relationship with her supervisor. There being no factual dispute, only a dispute as to which legal standard to apply, the Court held that this personal secretary "was not a confidential employee,"[171] and directed the Seventh Circuit to "enter an order enforcing the Board's order."[172]

In a separate opinion, concurring in part[173] and dissenting in part,[174] Justice Powell, the author of the *Bell Aerospace* opinion, would have impliedly excluded from the protection of the Act, if not a broad spectrum

---

sions were controlled by the remaining three Justices: Douglas (later replaced by Stevens), Stewart (later replaced by O'Connor) and Blackmun. In *Bell Aerospace*, Justices Douglas and Blackmun sided with management and Justice Stewart sided with the NLRB. Justice Douglas, who authored the oft-quoted dissent in *Packard* (see *supra* text accompanying notes 47-49), advocated that a clear line be maintained between management and labor. In *Yeshiva*, Justice Stevens, who had replaced Justice Douglas on the Court, voted with management, while Justices Blackmun and Stewart exchanged positions resulting in no net effect, and management prevailed once again. In *Hendricks*, Justice O'Connor, who had replaced Justice Stewart, voted with management, while Justice Blackmun's vote remained with the NLRB and Justice Stevens, in what some observers considered a surprising shift, also voted with the NLRB. The significance of Justice Stevens as the deciding swing vote is important because of his more sympathetic disposition toward confidential employees than managerial employees.

[170] 454 U.S. at 191.

[171] *Id.* To prevent all personal secretaries to general managers and chief executive officers from celebrating this apparent invitation to unionize, the majority included this caveat in its opinion:

> We do not suggest that personal secretaries to the chief executive officers of corporations will ordinarily not constitute confidential employees. *Hendricks* is an unusual case, inasmuch as [the personal secretary's] tasks were "deliberately restricted so as to preclude her from" gaining access to confidential information concerning labor relations. 236 N.L.R.B. 1616, 1619 (1978). Whether Hendricks imposed such constraints on [the personal secretary] out of specific distrust or merely a sense of caution, it is unlikely that [her] position mirrored that of executive secretaries in general.

Id. at 191 n.23.

[172] *Id.* at 191.

[173] *See supra* note 155 for an explanation of the concurrence in part and dissent in part.

[174] 454 U.S. at 192 (Powell, J., dissenting).

of confidential employees as indicated by his concurrence, at least confidential secretaries and clerks.[175] The dissenters indicated that this position was mandated by the express statement concerning confidential secretaries in the Conference Report.[176] However, no clear mandate concerning confidential employees emerged from the ambiguity of that report. The significant point arising from the concurrence and dissent is that the minority did not condemn the labor nexus standard except as applied to confidential *secretaries*.[177]

The narrower labor nexus standard is the proper approach as to confidential employees. The underlying reason for the test is to prevent unions from obtaining advance information of management's labor relations policy. This reason is a valid one. Confidential employees with a labor nexus could obtain this advance information so they should at least be excluded from bargaining units. General confidential employees without a labor nexus do not obtain this advance information; consequently, there is no need to deny them all the rights of employees guaranteed in the Act. As for the ambiguous Conference Report,[178] a very good case can be made for the position that when Congress expressly mentioned confidential secretaries, they were referring to secretaries to whom the labor nexus test had been applied and met. This was probably the case and would explain away the ambiguity of the report at least where the labor nexus standard was concerned. This approach is much more credible than the forced, polar approaches of *Bell Aerospace*[179] and *Hendricks*.[180]

The labor nexus standard as to confidential employees, then, has been logically and judicially vindicated. But what of the limited implied exclusion? This is the open question after *Hendricks*, *i.e.*, whether confidential employees should merely be excluded from bargaining units or totally excluded from the definition of employee under the Act?

VII. POST *HENDRICKS*: LIMITED IMPLIED EXCLUSION OR TOTAL EXCLUSION—A RECOMMENDATION

The personal secretary in *Hendricks* was found not to be a confidential employee; she did not meet the confidentiality prong of the labor

---

[175] *Id.*

[176] *See supra* note 61 and accompanying text.

[177] It would seem that the majority and the dissent do not entertain polar views in this area. The only apparent difference is that the dissent would impliedly exclude *all* personal secretaries whereas the majority would find that *most* personal secretaries would meet the labor nexus test and be excluded from bargaining units, but not the particular secretary in *Hendricks*.

[178] *See supra* note 61 and accompanying text.

[179] NLRB v. Bell Aerospace Co., 416 U.S. 267, 284 n.12 (1974).

[180] 454 U.S. at 187.

nexus test.[181] Because of this, the treatment of confidential employees was an issue not squarely before the Court. Had the personal secretary been found to be a confidential employee, the Court would have had to resolve the treatment issue. As mentioned above, the secretary had engaged in concerted activity. According to the Board's limited implied exclusion treatment, this would be considered protected activity even for confidential employees. According to the Seventh Circuit, the secretary would have been impliedly excluded from the definition of employee under the Act; consequently, this activity would be unprotected by the Act and the company would be permitted to discharge her. This personal secretary, however, was the wrong petitioner and, as the majority stated, the treatment issue would "be more properly addressed in a case that presents it."[182] Thus, there are no Supreme Court cases that directly confront this question. After *Hendricks*, the question remains open. The discussion below will center on the difference between the Board's position and some circuit courts' positions, and recommend a resolution to these differences.

The Board position, that of applying the limited implied exclusion to confidential employees, is evident in Board case law[183] and also in its arguments to the Supreme Court. In its *Hendricks* brief, the Board argued that "even if [the personal secretary] were found to be a 'confidential secretary' . . . it would not follow that [the employer] was free to discharge her for engaging in protected, concerted activity."[184] The Board also argued that the limited implied exclusion "strikes a reasonable balance between employee rights expressly protected by . . . the Act . . . and management's important interest in insuring against the disclosure of confidential information."[185] The Board's position in favor of the limited implied exclusion is formidable indeed, because the Board had applied this treatment to confidential employees "without exception for more than 40 years."[186] The Board's position was not without merit, but there were circuit courts that favored a total implied exclusion for confidential employees.

---

[181] *Id.* at 190.

[182] *Id.* at 185-86 n.19.

[183] *See, e.g.*, Service Technology Corp., 196 N.L.R.B. 1036, 1043 (1972), *enforced, mem.*, 480 F.2d 923 (5th Cir. 1973), *cert. denied*, 415 U.S. 948 (1974); Southern Greyhound Lines, Div. of Greyhound Lines, Inc., 169 N.L.R.B. 627 (1968), *enforced*, 426 F.2d 1299, 1301 (5th Cir. 1970); American Book-Stratford Press, Inc., 80 N.L.R.B. 914, 915 (1948); Coopersville Coop. Elevator Co., 77 N.L.R.B. 1083, 1084-85 (1948); Southern Colo. Power Co., 13 N.L.R.B. 699, 710 (1939), *enforced*, 111 F.2d 539 (10th Cir. 1940).

[184] Brief for the NLRB at 41, NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981).

[185] *Id.* at 42.

[186] *Id.* at 43. The Board overstates its case somewhat in using the "without exception" language. Although the overwhelming majority of Board cases employed the implied limited exclusion treatment as to confidential employees, there was a

In the 1971 case of *NLRB v. Wheeling Electric Co.*,[187] an employee, stipulated to be confidential by both parties, was discharged for engaging in concerted activity. The sole issue was whether the confidential employee could be considered an employee for purposes of the Act. The Fourth Circuit answered in the negative, opting for a total implied exclusion for this confidential employee.[188] The court based its approach on the legislative history of the 1947 amendments, particularly the "outside the scope of the Act" language from the Conference Report.[189] The underlying rationale for the holding was as follows:

> It strikes us as nonsense for the Board to exclude [a confidential employee] from membership in a bargaining unit *and then* extend to her the same protection for the same concerted activity that she would have enjoyed if a union member. If [she] is committed to the union to the extent she joins the strike by refusing to cross the picket line, it would seem to matter little to the company that she is not technically a union member. A confidential secretary who plights her troth with the union differs in form, but not in substance, from one who holds a union card. Since she cannot formally join the unit, there is nothing incongruous in holding that she cannot "plight her troth" with the unit. Indeed, it seems more consistent to say that if she cannot act in concert by participating in the unit, then she cannot act in concert on an informal basis, or more accurately, that if she does so, it will be without the protection of the Act.[190]

In the 1973 case of *Peerless of America, Inc.*,[191] the Seventh Circuit also adopted the total implied exclusion position as to confidential employees. Citing *Wheeling*, this court held that a plant manager's personal secretary's "position as confidential secretary rendered her . . . excluded from the protection of the Act."[192] The Second Circuit also adopted the holding and spirit of *Wheeling*.[193]

The circuit courts' use of the total implied exclusion was founded on compelling reasons. They are, however, pitted against over forty years

---

handful of decisions which used language connoting a total implied exclusion. *See, e.g.*, Armour & Co., 54 N.L.R.B. 1462, 1465 (1944); Armour & Co., 49 N.L.R.B. 688, 690 (1943); General Motors Corp., 53 N.L.R.B. 1096, 1098 (1943).

[187] 444 F.2d 783 (4th Cir. 1971).

[188] *Id.* at 786.

[189] *See supra* note 61 and accompanying text.

[190] 444 F.2d at 788. The *Hendricks* decision has not altered the Fourth Circuit's treatment of confidential employees. In NLRB v. Rish Equip. Co., 111 L.R.R.M. (BNA) 2321 (1982), a confidential employee was held to be exempt from the protections of the Act.

[191] 484 F.2d 1108 (7th Cir. 1973).

[192] *Id.* at 1112.

[193] Bell Aerospace Co. v. NLRB, 475 F.2d 485, 494 (2d Cir. 1973).

of Board practice. With neither side appearing likely to recede from its respective positions, only the Supreme Court or Congress will be able to resolve the issue effectively. During the interim, the National Labor Relations Act, its very title conjuring up notions of uniform application on a nationwide basis, will be providing protection to confidential employees working in the "limited implied exclusion" circuits but denying protection to the identical confidential employees in the "total implied exclusion" circuits. Because of this disparate treatment, the issue should be resolved by the appropriate body—Congress[194]—in the following manner.

Although the limited implied exclusion has been employed by the Board for many years, a total exclusion as to confidential employees is the proper approach. The reasoning for this is fourfold. First, although under section 9[195] of the Act, the Board is charged with determining the proper bargaining units for collective bargaining, there is no similar statutory mandate charging the Board to interpret the scope of the term "employee" under the Act. Where the Board has endeavored to determine the scope of "employee" under the Act, such as in determining that supervisors and managerial employees were "employees" under the Act, the Board has erred in a blatantly pro-labor/anti-management fashion. Any attempt by the Board to interpret the scope of the term "employee" under the Act must be viewed skeptically with the previous attempts in mind.

Second, in carrying out its task of determining proper bargaining units, the Board has narrowed the spectrum of employees that management can successfully characterize as confidential by narrowing the labor nexus standard. This administrative narrowing has resulted in a class of confidential employees who are properly allied to management. These employees should not need the protection of the Act because of this close association with management. Any "protection" that they require should be inherent in their relationship with management. If the confidential employee, allied with management, wishes to break with management and join the ranks of labor for one reason or another, that

---

[194] The reasons for Congress being the proper body to resolve this issue are threefold. First, it was Congress that spawned the current controversy through the ambiguity of the legislative history of the 1947 amendments. Instead of relying on Court and Board interpretations of what Congress meant, Congress should come forth and if not explain what it "meant," explain what it now means. Second, determining the statutory definition of employee is much more a legislative duty than a judicial one. This is obvious from the fact that Congress has taken upon itself expressly to exclude many classes of workers from the definition of employee within the Act. Finally, a Supreme Court resolution of the issue will not necessarily mean that the Court has satisfactorily interpreted the scope of the term "employee" within the Act; it will merely mean that for one reason or another the pro-NLRB bloc or the pro-management bloc of Justices has prevailed. *See supra* note 169.

[195] National Labor Relations Act, 29 U.S.C. § 159(b) (1975).

employee should not be afforded the protection of the Act. Affording the employee the protection of the Act, and merely leaving it to the employer to break off the confidential relationship, will in most cases be inadequate relief for management because the damage, *e.g.* leaking management's bargaining position, will already be done.

Third, it is very unlikely that confidential employees start out as such with their employer. The relationship involves one of earned trust, accumulated over a period of time. But when the relationship does occur, the confidential employee truly becomes allied with management. Employees should be fully apprised of the situation, so that in deciding to accept the confidential relationship, they are aware that they will no longer be statutory "employees" under the Act. In this way, the employee could decide for himself which "protection" he desired, that from management or that from the Act. Also, the all or none approach of the total exclusion would make clearer the line between management and labor.

Finally, the circuit courts which utilize the total exclusion have based this practice on the legislative history of the 1947 amendments and also on a well-founded rationale. Because this rationale is more compelling than the Board approach, and for the other reasons stated above, the total exclusion as to confidential employees is the proper treatment.

For the sake of nationwide uniformity under the Act, it is submitted that Congress should expressly implement the total exclusion by amending the Act. The simplest method for doing so would be to amend section 2(3) of the Act to read:

> The term "employee" shall include any employee, . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, [or any individual who assists and acts in a confidential capacity to individuals who formulate, determine and effectuate management's policies in the field of labor relations], or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.[196]

VIII. CONCLUSION

Often times, when controversy is the order of the day, it is most beneficial to strike a compromise. Such is the case with the standard

[196] *Id.* at § 152(3). The bracketed portion is the clause proposed for inclusion in the definition of employee to insure uniform, nationwide treatment of confidential employees.

and treatment of confidential employees. The Supreme Court has accepted the validity of the labor nexus standard for confidential employees. The use of this standard is appropriate. The total exclusion for confidential employees represents the best compromise for determining the scope of the Act. This is not, however, compromise for the sake of compromise. Both the labor nexus standard and the total exclusion treatment are the better approaches.

By incorporating the labor nexus standard into a total *expressed* exclusion of confidential employees from the definition of employee under the Act, Congress would be enacting a compromise which would be palatable to both management and labor. Management will be assuaged because now, on a nationwide basis, they will be able to deal properly with non-loyal confidential employees without incurring liability under the Act. Labor should be comforted by the fact that the narrow labor nexus standard is used.

THOMAS L. MCGINNIS